84-1509

No. 84-——

Office-Supreme Court, U.S.
FILED
MAR 25 1985
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SEATTLE-FIRST NATIONAL BANK,
Petitioner,

v.

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL NO. 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO; NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 25, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

90pp

QUESTION PRESENTED FOR REVIEW

Whether the National Labor Relations Board acted rationally and in a manner consistent with the National Labor Relations Act when it refused to amend its certification of the exclusive bargaining representative for all unit employees of Seattle-First National Bank based upon the results of an affiliation election in which only some employees—union members—could vote.

LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

Seattle-First National Bank is a wholly-owned subsidiary of Seafirst Corporation, which is, in turn, a wholly-owned subsidiary of BankAmerica Corporation. All of Seattle-First National Bank's subsidiaries are wholly owned, excluding director qualifying shares in certain instances. BankAmerica Corporation's subsidiaries (except wholly-owned subsidiaries) are: Investment Guaranty Corporation, Banca d'America e d'Italia, BancAmerica Options, Inc., BA Australia Limited, BA Finance (Switzerland) Ltd., Bank of America Cameroon S.A., Commercial Bank of Africa Ltd., BA Servicios, S.A., and Consumer Credit Service, Inc. Should the Court desire disclosure of wholly-owned subsidiaries of BankAmerica Corporation, Seattle-First National Bank will supplement its list of subsidiaries and affiliates.

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SEATTLE-FIRST NATIONAL BANK,
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FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL NO. 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO; NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Seattle-First National Bank respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 2, 1984.

OPINION BELOW

The opinion of the Ninth Circuit is reported at *Financial Institution Employees of America, Local No. 1182 v. NLRB*, 752 F.2d 356 (9th Cir. 1984). It is found in the Appendix at pp. 1a through 27a. The Ninth Circuit's order denying the Bank's petition for rehearing and rejecting its suggestion for rehearing en banc is reported at

Financial Institution Employees of America, Local 1182 v. NLRB, 750 F.2d 757 (9th Cir. 1984), and is found in the Appendix at pp. 28a through 31a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 2, 1984. The court denied a timely petition for rehearing on December 26, 1984. The Petition for a Writ of Certiorari has been filed within ninety days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 1 of the National Labor Relations Act (the "Act"), 29 U.S.C. § 151, provides, in pertinent part:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 7 of the Act, 29 U.S.C. § 157, provides, in pertinent part:

> Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

Section 9(a) of the Act, 29 U.S.C. § 159(a), provides, in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment....

Section 102.60(b) of the Rules and Regulations of the National Labor Relations Board, 29 C.F.R. § 102.60(b), provides, in pertinent part:

> *Petition for clarification of bargaining unit or petition for amendment of certification under § 9(b) of the Act; who may file; where to file; withdrawal.* A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question concerning representation, may be filed by a labor organization or by an employer. . . .

STATEMENT OF THE CASE

Seattle-First National Bank is a national banking association engaged in activities in Washington State. From 1938 until 1969, an independent association represented the Bank's employees. This association in 1969 affiliated with the Marine Engineers Beneficial Association ("MEBA"). A year later, the National Labor Relations Board conducted an election in which employees ousted MEBA in favor of the Firstbank Independent Employees Association (the "Independent"), an unaffiliated entity, which was certified as the exclusive bargaining representative of unit employees on November 30, 1970. In November 1971, the Bank and the Independent negotiated a three year agreement. A second three year contract was entered into in August of 1974 and ultimately expired on October 30, 1977. Bargaining

between the Bank and the Independent for a new contract began in the summer of 1977 and extended into early 1978.

By letter dated January 6, 1978, the Independent gave notice of its intent to submit to its membership the question of an affiliation with the Retail Clerks International Union ("RCIU"). The Independent's constitution limited the privilege of voting to members "in good standing on the last working day of the month prior to the notice of election." Nevertheless, the Independent encouraged nonmembers to join the union and vote in the affiliation election, provided they paid one month's dues prior to January 19, 1978. Unit employees who did not join the Independent as of that date were excluded from the vote, even though the union knew that applicable precedent required their participation. *See Jasper Seating Co.*, 231 N.L.R.B. 1025 (1977.) As a consequence, although the Independent represented 4,790 unit employees, only 2,624 ballots were mailed on February 5, 1978.[1] Those voting in favor of affiliation numbered 1,206, 25.17% of the bargaining unit. Those opposed and those not permitted to vote amounted to 2,939 employees, or 61.4% of the unit. Based on these results, the Independent's officers applied for a charter from the RCIU, which was issued effective April 1, 1978.

On June 9, 1978, the RCIU affiliate filed a petition with the Board to amend the existing certification of bargaining representative by substituting Financial Institution Employees of America, Local 1182, chartered by Retail Clerks International Union, AFL-CIO ("Local 1182") for the Independent. The Bank resisted the petition, ar-

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[1] It is not clear that the Independent had this many members. In January, 1978, only 1,569 members paid monthly dues. Voters included numerous individuals who had been on dues checkoff prior to October 15, 1977, but who had not subsequently paid dues. The union conceded that it did not know how many of these employees considered themselves members.

guing *inter alia* that (1) the affiliation election could not serve as the foundation for an amended certification under *Jasper Seating* because the Independent had deprived more than 2,000 represented employees of the opportunity to vote; and (2) the certification could not be amended without a Board-conducted election because the affiliation had created a new and different union, raising a question concerning representation that only the Board could resolve. The Board rejected these arguments and on April 5, 1979, issued a decision amending the certification as requested. App. 49a-54a; *Seattle-First National Bank*, 241 N.L.R.B. 751 (1979). The Bank thereafter refused to bargain with Local 1182, asserting the invalidity of the amended certification. Following unfair labor practice proceedings, the Board on September 28, 1979, issued a decision and order finding that the Bank had violated the Act by reason of the refusal to bargain. App. 39a-48a; *Seattle-First National Bank*, 245 N.L.R.B. 700 (1979).[2]

The Bank sought review of the Board's decision in the Ninth Circuit. *Seattle-First National Bank* v. *NLRB*, No. 79-7515 (9th Cir.). While the Bank's petition was pending, the United States Court of Appeals for the Fifth Circuit issued its decision in *Amoco Production Co. v. NLRB*, 613 F.2d 107 (5th Cir. 1980), remanding that case to the Board for further consideration of factual issues related to the continuity of a bargaining representative after affiliation. Because the Board had relied upon *Amoco Production Co.* (*Amoco III*), 239 N.L.R.B. 1195 (1979), in granting Local 1182's petition for an amended certification, it asked that the Ninth Circuit remand this case for further consideration in connection

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[2] Before disposition of the unfair labor practice charge, the RCIU merged with the Amalgamated Meat Cutters and Butcher Workmen to form the United Food and Commercial Workers International Union (the "UFCW"). App. 39a-40a, n.1.

with the Fifth Circuit remand. On June 27, 1980, the Ninth Circuit complied with the request.

On remand, the Board reversed its unfair labor practice determination and withdrew the amended certification. Following the reasoning it adopted in *Amoco Production Co.* (*Amoco IV*), 262 N.L.R.B. 1240 (1982), the Board held that the affiliation election could not serve as the foundation for an amended certification because it had excluded nonmember unit employees from the vote, in violation of fundamental democratic due process standards. App. 33a-37a; *Seattle-First National Bank*, 265 N.L.R.B. 426 (1982).

Local 1182 filed a petition for review in the court below. On August 2, 1984, a panel of the court of appeals, Judge Wright dissenting, granted the petition for review and remanded the case, ruling that the Board could not deny a petition to amend its certification solely because the union had excluded many of the employees it represented from the decision to seek the amendment. App. 1a-27a. The Bank petitioned for rehearing on August 16, 1984, suggesting rehearing en banc. On December 26, 1984, the Ninth Circuit denied the petition for rehearing and rejected the suggestion for en banc consideration. Judges Kennedy, Sneed, Anderson, Hall, Poole and Norris dissented from the denial of rehearing en banc. App. 29a-31a.

REASONS FOR GRANTING THE WRIT

The decision below directly conflicts with the decision of another court of appeals that approved the Board's policy requiring evidence of employee consent as a prerequisite to an amendment of union certification. The importance of this issue in a time of union centralization makes intolerable the resulting uncertainty, which only this Court can resolve. Furthermore, the decision below impairs the fundamental national labor policy, recognized in decisions of this Court, protecting the "full free-

dom" of all employees to select the entity that will serve as their exclusive bargaining representative. In concluding otherwise, the court below engaged in an independent balancing of assertedly conflicting policies and showed no deference to the Board. It thus departed from this Court's recognition of the Board's primary responsibility for protecting employee free choice. Accordingly, review on certiorari is merited under Rule 17.1 of the Rules of the Supreme Court.

I. THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS ON AN ISSUE OF IMPORTANCE IN ADMINISTRATION OF THE ACT.

The Board in *Amoco IV*, 262 N.L.R.B. 1240, held that it would not amend its statutory certification of an exclusive bargaining representative based solely upon an affiliation election in which only some represented employees—union members—could participate. It rested its decision on the premise

> that, in order to provide adequate due process safeguards in an affiliation election, all unit employees, whether union members or not, must be permitted to participate and vote in an affiliation election.

262 N.L.R.B. at 1241. Finding that the Board "clearly articulated reasonable grounds for" this policy, the United States Court of Appeals for the Fifth Circuit in *Local 4-14, OCAW v. NLRB*, 721 F.2d 150 (5th Cir. 1983), affirmed the Board:

> [W]e are unable to say that the general ruling that now requires the participation of nonunion members in an affiliation election is irrational or inconsistent with the Act, or that it is beyond the wide discretion of the Board to establish procedures in an affiliation election that will ensure the fair and free choice of the bargaining representative of all the employees.

721 F.2d at 152-153.

The Board applied the *Amoco IV* principle here. *See* App. 35a. The court below, however, rejected the Board's rule, finding it "irrational and inconsistent with the National Labor Relations Act." App. 11a. Judge Wright disagreed, alluding to the Fifth Circuit's decision and finding that "[a]n intercircuit conflict over the rationality of the Board's decision is unwarranted." App. 25a (Wright, J., dissenting). Similarly, Judge Kennedy, with whom Judges Sneed, Anderson and Hall joined in dissenting from denial of rehearing en banc, concluded that "[n]either the Board in announcing the rule nor the Fifth Circuit in sustaining it acted outside the bounds of reason." App. 30a. Judge Norris, joined by Judges Poole and Hall, also dissented from denial of rehearing en banc, agreeing "with the Fifth Circuit that the rule falls within the bounds of NLRB discretion." App. 31a (citation omitted).

By creating an intercircuit conflict, the decision below leaves in doubt the scope of employee consent that the Board may require before it will amend its certification based upon a union affiliation. The resulting confusion is intolerable, for the movement toward union centralization and consolidation requires a clear rule to guide unions, employees, and employers. Between 1979 and June of 1984, more union mergers and affiliations occurred than in any similar period since 1955. Adams, *Labor Organization Mergers 1979-84: Adapting to Change*, 107 Monthly Lab. Rev. No. 9, Sept. 1984, at 21. Most of these combinations were, like the affiliation here, "the result of an absorption of a small labor organization by a much larger one." *Id.*[3] Nothing sug-

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[3] Adams analyzed thirty selected "mergers," which were defined to include affiliations. This constitutes "fully a third of all [mergers] that have occurred since the A.F.L. and C.I.O." combined in 1955. Raskin, *Labor's Grand Illusions*, N.Y. Times Magazine, February 10, 1985, at 52, 67, col. 1. Eighteen mergers involved the absorption of one union by another at least twenty times its size. Three of these involved the international affiliate of Local 1182. Adams, *supra* at 23-24.

gests that this trend toward centralization will abate, rendering it essential that this Court lend finality to the Board's announcement of the evidence it will require before amending its certification.[4]

II. THE DECISION BELOW VIOLATES THE FUNDAMENTAL NATIONAL LABOR POLICY PROTECTING THE "FULL FREEDOM" OF EMPLOYEES TO SELECT THEIR BARGAINING REPRESENTATIVE.

Congress has declared that national labor policy requires protection of "the exercise by workers of *full freedom* of association, self-organization, and designation of representatives of their own choosing . . ." § 1 of the Act, 29 U.S.C. § 151 (emphasis added). Congress thereby expressed its intent that employees, like voters in governmental elections, would be guided solely by their own good judgment in choosing their statutory bargaining representative, free from the dictates of those who would profess to have their best interests at heart. The decision below would, perhaps unwittingly, undermine employees' "full freedom" of choice by conferring upon the Board and the courts, rather than upon affected employees, the right to determine whether a change in the certification of a bargaining representative warrants an expression of employee consent. This Court should review the deci-

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[4] The importance of the Board's *Amoco IV* rule is illustrated by its application in several recent cases, not all of which concern affiliations. *See May Department Stores Co.*, 268 N.L.R.B. 979 (1984) (affiliation of multi-unit independent union with UFCW); *F. W. Woolworth Co.*, 268 N.L.R.B. 805 (1984) (merger of two UFCW locals); *Furr's Cafeterias, Inc.*, 268 N.L.R.B. 988 (1984) (merger of two UFCW locals); *1820 Central Park Avenue Restaurant Corp. d/b/a Charlie Brown's*, 271 N.L.R.B. No. 68 (July 25, 1984) (division of local into two locals). The *May Department Stores* and *F. W. Woolworth* cases are now before courts of appeal on the UFCW's petitions for review. *United Food & Commercial Workers Local 568 v. NLRB*, No. 84-1243 (D.C. Cir.); *United Retail Workers Union Local 881 v. NLRB*, No. 84-2000 (7th Cir.).

sion below because of the importance of this issue in administration of the Act.

A. This Court Has Recognized Employees' Absolute Right to Choose Their Bargaining Representative.

This Court has not hesitated to protect the unfettered right of employees to choose the entity that will act as their exclusive bargaining agent. In *Hill v. Florida*, 325 U.S. 538 (1945), the Court considered a Florida statute that imposed licensing and reporting requirements on unions and their business agents. Justice Black, writing for the majority, emphasized the broad scope of employee discretion that Congress intended:

> The declared purpose of the Wagner Act, as shown in its first section, is to encourage collective bargaining, and to protect the "full freedom" of workers in the selection of bargaining representatives of their own choice. . . . Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide.

Id. at 541. The Court thus held that the Wagner Act preempted the Florida statute, concluding that "the 'full freedom' of employees in collective bargaining which Congress envisioned as essential to protect the free flow of commerce among the states would be, by the Florida statute, shrunk to a greatly limited freedom." *Id.* at 542.

Justice Black's expansive view of employee freedom in designating bargaining representatives remains a vital principle of national labor policy. In *Brown v. Hotel and Restaurant Employees Local 54*, 104 S.Ct. 3179 (1984), the Court upheld a New Jersey statute that restricted the class of persons eligible to hold office in unions representing casino employees. Although characterizing the right to select union officials as "less than absolute," the majority emphasized "that this conclusion does not impli-

cate the employees' express § 7 right to select a particular labor union as their collective bargaining representative . . . ." *Id.* at 3190. Justice White, joined in dissent by Justices Stevens and Powell, agreed that employees have an "absolute § 7 right to choose which labor organization will act as their bargaining representative . . . ." *Id.* at 3192-93, n.3. Furthermore, the dissent observed that even "a nonunion employee in an agency shop retains his § 7 right to participate in the selection of the bargaining representative," though he may forfeit his right to participate in certain decisions delegated to the bargaining representative. *Id.*

The fact that an employee is represented by a union to which he does not belong, then, does not limit his "full freedom" to choose a bargaining representative. *See* § 7 of the Act, 29 U.S.C. § 157 (granting employees "the right to refrain from" union activities). In contrast to the decision below, the Board's ruling here recognized this fundamental principle.

B. The Rule Applied by the Board in This Case Protects Employees' Full Freedom in Designating Their Bargaining Representative.

Section 7 of the Act implements the protection of employees' "full freedom" of association by guaranteeing their right "to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157. Representatives chosen freely

> by the majority of employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for purposes of collective bargaining . . . .

§ 9(a) of the Act, 29 U.S.C. § 159(a). Although less formal methods exist, a Board-conducted election is the preferred method of determining exclusive representative status. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969). Thus, when the Board finds that "a question of

representation exists"—that is, when it determines that there is a question "as to a claimed majority status" of a labor organization, *Standard Oil Co.*, 127 N.L.R.B. 656, 657 (1960) (Leedom, dissenting)—it will supervise an election to resolve the question. *See* § 9(c) of the Act, 29 U.S.C. § 159(c). The Board then "certifies" the results of this election, removing all doubt as to the representative's status. *Id.*

The Act neither provides for nor mentions "amended" certifications of bargaining representatives after an affiliation. However, the Board traditionally has permitted amendments without a supervised election provided there is an "absence of a question concerning representation." 29 C.F.R. § 102.60(b). Although this rule, which the court of appeals accepted (*see* App. 8a), does not demand adherence to any rigid formula, it logically requires that the union seeking the amendment demonstrate an absence of doubt as to its majority support. *See J. H. Day Co.*, 204 N.L.R.B. 863 (1973) (amended certification granted only when affiliation procedures "substantially eliminate the possibility of a question concerning representation"). The Board's duty to protect employee free choice compels this requirement. Because the Board may issue a statutory certification only upon being satisfied that a bargaining representative has been freely chosen by a majority of unit employees, the petitioning union must show that the change in designation accomplished by the amendment enjoys majority support.

When an affiliation takes "place under circumstances that do not indicate that the change reflected a majority view," the Board has found a question concerning representation, i.e., a doubt as to majority status. *North Electric Co.*, 165 N.L.R.B. 942 (1967). Accordingly, "the factor of primary importance is whether the employees have had the opportunity to pass on the change of representative." *Newspapers, Inc.*, 210 N.L.R.B. 8, 9 nn. 3-4 (1974), *enf'd*, 515 F.2d 334 (5th Cir. 1975). If that op-

portunity has not been given, the Board cannot be certain that the petitioning union has the majority support that Congress required as a predicate to statutory certification. This uncertainty may be resolved only through a Board-conducted election under Section 9(c) of the Act, 29 U.S.C. § 159(c).[5]

The Board has labeled this examination of employee support a "due process" inquiry. In 1977, the Board held that due process required that nonunion unit employees be "given an equal unqualified opportunity to participate in [an] affiliation vote." *Jasper Seating Co.*, 231 N.L.R.B. 1025, 1026 (1977). The Board thus announced that it would *not* amend certifications based upon affiliation votes that excluded nonunion employees.[6]

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[5] In addition, the Board will inquire into the "continuity" between the certified union and the union seeking the amended certification. If that inquiry shows that the petitioner is a "new and different" union, the Board must conduct a supervised election before issuing its certification. *Standard Oil Co.*, 127 N.L.R.B. 656 (1960). At least one court of appeals has indicated that an affiliation of an independent with a large international union creates a "new and different" union. *American Bridge Div., United States Steel Corp. v. NLRB*, 457 F.2d 660 (3d Cir. 1972); *Sun Oil Co. of Pennsylvania v. NLRB*, 576 F.2d 553 (3d Cir. 1978). Because the Board found the scope of franchise too limited in this instance, it did not reach the continuity question in its 1982 decision. The court of appeals declined to do so as well. App. 6a, n.4.

[6] Although one Board member concurred on other grounds, he too condemned members-only voting. *Jasper Seating*, 231 N.L.R.B. at 1027 (Penello, concurring). Prior to *Jasper Seating*, the Board limited its consideration of due process to a review designed to assure itself that the union's affiliation procedures were not "so lax or 'substantially irregular' as to negate the validity of the election . . . ." *Hamilton Tool Co.*, 190 N.L.R.B. 571, 575 (1971). Peculiarly, however, the Board had held, over vigorous dissent, that certifications could be amended based upon union-conducted affiliation votes that excluded represented employees who were not union members. *East Ohio Gas Co.*, 140 N.L.R.B. 1269 (1963) (Rodgers, dissenting); *North Elec. Co.*, 165 N.L.R.B. 942 (1967)

Jasper Seating constituted the governing precedent when Local 1182 conducted its limited franchise election in early 1978. However, by the time this case reached the Board in 1979, it had overruled *Jasper Seating* in *Amoco III*, 239 N.L.R.B. 1195 (1979), *remanded* 613 F.2d 107 (5th Cir. 1980), prompting vigorous protests by Board Members Jenkins and Penello. *See Providence Medical Center*, 243 N.L.R.B. 714, 716, 718 (1979) (Jenkins and Penello, dissenting separately).[7] While this case was pending on remand in 1982, the Board returned to the rule of *Jasper Seating*, holding that all unit employees must be permitted to voice their preferences before the statutory certification of their exclusive bargaining representative may be changed. The Board reasoned:

> If the Board is to accept privately conducted elections as a basis for amending Board certifications, it should be certain that minimal standards of due process be observed lest the very validity of Board certifications and elections be undermined. Granted that employees in a bargaining unit cannot be com-

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(Jenkins and Zagoria, dissenting); *Hamilton Tool Co.*, 190 N.L.R.B. 571 (Jenkins, dissenting); *Bear Archery, Div. of Victor Comptometer Corp.*, 223 N.L.R.B. 1169, 1172 (1976) (Walther, dissenting), *enforcement denied*, 587 F.2d 812 (6th Cir. 1977).

[7] At approximately this same time, scholarly opinion began to divide sharply over the scope of consent required by the Act—a division that has widened with time. *Compare* Note, *Union Mergers and the Amendment Certification Procedure*, 28 Cath. U. L. Rev. 587, 603 (1979) (advocating participation of all unit employees in merger and affiliation elections) *and* R. Williams, *NLRB Regulation of Union Bargaining Rights When Affiliation Changes* (U. Pa. 1982) (arguing that no amendment of certification should be permitted absent a Board-conducted election) *with* Comment, *Union Affiliations and Collective Bargaining*, 128 U. Pa. L. Rev. 430, 467 (1979) (asserting that nonmembers need not be permitted to vote) *and* Hale, *Union Affiliations: Examination of the Governing NLRA Standards*, 3 Det. C. L. Rev. 709, 742 (1983) (arguing that no affiliation election is necessary to accommodate employee free choice).

> pelled to vote, they can, at the very least, be afforded *the opportunity to vote.* It appears basic to the collective bargaining process that the selection of a bargaining representative be made by the employees in the bargaining unit. In our view, therefore, a cardinal prerequisite to any change in designation of the bargaining representative is *that all employees* in the bargaining unit be afforded the opportunity to participate in such selection.

Amoco IV, 262 N.L.R.B. at 1241, *quoting North Electric Co.*, 165 N.L.R.B. at 944 (Jenkins and Zagoria, dissenting) (emphasis in original). The Board thus found its rule necessary to protect the "basic" right of employees to choose their representative. To hold otherwise, the Board observed, "would deprive *employees* of the benefits guaranteed by the Act." *Id.* at 1242 n.12 (emphasis in original).

C. The Decision Below Impairs Employees' Absolute Right to Choose Their Bargaining Representative.

The simplicity and logic of the Board's rule cannot be directly assailed. Rather than do so, the decision below concluded that procedures followed prior to *Jasper Seating* "adequately protected the critical rights of employees to be represented by a union selected by a majority of employees in the unit . . . ." App. 20a. In fact, however, the procedures that the court of appeals advocated curtail employees' "critical rights" by allowing unions, the Board, and the courts to decide on an *ad hoc* basis that it is unnecessary to permit the exercise of those rights.

The court below relied upon the Board's inquiry into what is commonly known as "continuity of representation" to protect employees' Section 7 rights.[8] *See* n.5,

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[8] The court of appeals also found that decertification procedures adequately protected employees' Section 7 rights. This conclusion is repugnant to the Act. The court's rationale would justify virtually any impairment of free choice simply because employees

supra. Even when employees have acquiesced in affiliation through privately conducted elections, the Board has refused to amend its certification if the purported successor lacks continuity with the certified entity—*i.e.*, if it is a "new and different union." *See Standard Oil Co.*, 127 N.L.R.B. 656 (1960); *see also Independent Drug Store Owners*, 211 N.L.R.B. 701, 702 n.4 (1974), *aff'd sub nom. Retail Store Employees, Local 428 v. NLRB*, 528 F.2d 1225 (9th Cir. 1975) (amended certification denied despite approval of merger by unit employees). When continuity of representation is absent, the Board has held that the integrity of its certification requires that it supervise an election, rather than accepting the result of a less formal tally.

The court below asserted that this procedure protected employees by requiring an election whenever the Board concluded that a "question concerning representation" arose upon affiliation. App. 20a. Thus, the court would prohibit the Board from requiring evidence of employee consent so long as it finds only an "insubstantial change in the certified bargaining representative" as a result of affiliation. App. 20a. Under the decision below, then, employees do not have *full* freedom to participate in a change in their designated representative. Instead, their freedom is "shrunk to a greatly limited freedom," *Hill v. Florida*, 325 U.S. at 542, which may be exercised *only* when the Board decides that, in its view, the amended certification would accomplish such a substantial change as to raise a question concerning representation.

"genuinely disgruntled" by their deprivation of rights could invoke decertification remedies. App. 21a. Furthermore, the cumbersome decertification procedure is appropriate only after unit employees have freely selected their representative. *See* 29 U.S.C. § 159(c)(1)(A)(ii) (decertification petition may assert that certified union "no longer" enjoys majority support). The statute presumes an initial unfettered expression of views, which is precisely what the rule applied here protects.

The court of appeals did not, however, explain why the Board, rather than affected unit employees, should be empowered to assess the substantiality of the change in representative. The Act provides no explanation. Rather, it contemplates that employees will have unfettered freedom of choice, that "[t]heir own best judgment, not that of someone else, [will] be their guide." *Hill v. Florida*, 325 U.S. at 541. Thus, in this case, it is not for Local 1182, the Board, or the courts to decide whether the difference between the Independent and Local 1182 is significant enough to warrant a difference in employee support. All unit employees have "full freedom" to participate in that decision. By depriving nonunion employees of that freedom, the decision below would sharply curtail their fundamental Section 7 rights in violation of the principles enunciated by this Court in *Hill*. This Court therefore should review this case to assure that the policies underlying the Act are not impaired.

III. THE DECISION BELOW DEPARTS FROM THIS COURT'S DECISIONS BY SHOWING NO DEFERENCE TO THE BOARD'S ADOPTION OF SAFEGUARDS TO ENSURE THE FREE CHOICE OF BARGAINING REPRESENTATIVES.

The Board bears the responsibility of implementing the fundamental national policy of protecting employee freedom of choice. The means that it chooses in doing so rest within its sound judgment, subject to only limited review:

> Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives by employees. [Citations omitted]

NLRB v. A. J. Tower Co., 329 U.S. 324, 330 (1946). Ignoring this fundamental precept of the Act, the court below independently balanced the Section 7 rights recognized by the Board against the assertedly conflicting poli-

cies of noninterference in union internal affairs and of preserving the stability of bargaining relationships. The court thus usurped the Board's function as guardian of employee free choice, in violation of principles of judicial review established by this Court.

A. The Court Below Impermissibly Determined for Itself That There Is No Need for the Policy the Board Followed Here.

In assessing the necessity for the Board rule applied here, the court below not only reached a conclusion at odds with national labor policy (*see* pp. 15-17, *supra*), it also stepped outside the bounds of its proper role in reviewing the Board. Rather than evaluating the Board's decision for rationality and consistency with the Act, the court of appeals undertook an independent analysis of the need for the Board's policy favoring full employee participation in decisions to change a bargaining representative. It concealed this *de novo* review by asserting the irrationality of adopting a new procedure when the old one is, in the court's judgment, "effective." App. 20a.

The court below thus found the Board's policy "irrational" simply because it failed to discern an improvement over prior Board rules. Such a broad use of the term "irrational" would, however, permit unfettered reassessment of every administrative decision and circumvent the deferential standard of review that this Court has prescribed in cases arising under the Act. As Judge Kennedy observed in dissenting from denial of en banc rehearing:

> Reason is a juridical concept essential for the constancy of our decisions, and we undermine it if we use the term "irrational" to express disagreement with a proposition supported by articulated premises within the boundaries of tenable argument.

App. 29a.

The refusal of the court below to acknowledge the limited scope of its task is reason enough to review this case, for this Court has recognized that lower courts cannot reject Board policy based upon an independent appraisal of "need." In *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975), for example, the court of appeals independently evaluated the need for the Board's new rule granting employees the right to union representation at investigatory interviews. This Court rejected the lower court's effort to substitute a judicial judgment for the Board's:

> The Court of Appeals impermissibly encroached upon the Board's function in determining for itself that an employee has no "need" for union assistance at an investigatory interview. . . . It is the province of the Board, not the courts, to determine whether or not the "need" exists in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations.

420 U.S. at 266. The court below likewise "encroached upon the Board's function" when it concluded that there was no "need" for a unit-wide vote protecting the "full freedom" of unit employees to select their bargaining representatives. The Board, as the entity charged with issuing and policing certifications, has the duty of determining the procedures necessary to assure protection of statutory rights. The court below departed from this Court's decisions in failing to accord deference to the Board's determination of the need for its policy.

B. The Decision Below Improperly Rejects the Board's Conclusion That an Amendment of Certification Does Not Implicate Solely Internal Union Interests.

The Board has concluded that an effort to obtain its approval of an affiliation implicates its statutory certification responsibilities and does not involve solely internal union interests. As the Board observed in *Amoco IV*:

> If, in fact, union affiliations are internal union matters why does the Board even look to see if adequate due process has been achieved? The obvious answer to that question is that once either party raises the question of affiliation . . . it is incumbent upon the Board, before it places its imprimatur on an affiliation election, to assure that that election meets adequate due process standards.

262 N.L.R.B. at 1241. The court below, however, independently analyzed this question, gave no deference to the Board's conclusion, and rejected its reasoning. It thereby intruded upon the province of the Board as the entity responsible for balancing whatever conflicting interests may be implicated by a policy question arising under the Act.

The court of appeals reasoned that an amended certification proceeding implicates only "internal union" interests, provided there is "continuity" between the certified union and the newly affiliated union. It therefore accepted "the union's characterization of all affiliation decisions as internal union affairs . . . ." App. 11a-12a, n.9. Relying upon case law pertaining to discipline of union members, *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967); *NLRB v. Boeing Co.*, 412 U.S. 67 (1973), election of union officers, *Steel Workers v. Sadlowski*, 457 U.S. 102 (1982), and limits on piece work pay received by union members, *Scofield v. NLRB*, 394 U.S. 423 (1969), the court below noted the policy against interference in internal union affairs. It rejected the Board's decision here as violating that policy. App. 11a-17a.

However, the Board did not, as the decision below appears to assume, even purport to consider the effect of an affiliation on a union as a voluntary, private organization. The Board's ruling dealt only with the affiliate's request that the Board certify Local 1182 as the statutory representative of all unit employees. *See* App. 30a

(Kennedy, J., dissenting from denial of en banc rehearing.) This request, by definition, was entirely *external* to the union's powers as a voluntary association of dues paying members. In ignoring this fact, the decision below blurred "the important distinction between a union's status as a voluntary organization and its status as a certified or recognized bargaining agent." R. Williams, *NLRB Regulation of Union Bargaining Rights When Affiliation Changes* 24 (U. of Pa. 1982).

The failure of the court of appeals to differentiate between a union's dual roles explains its otherwise unaccountable reliance on *Allis-Chalmers*, *Boeing*, *Sadlowski*, and *Scofield*, none of which even remotely relates to a union's representative status.[9] In contrast, use of an affiliation election as the lever for a certification amendment brings into play the union's role as exclusive representative for *all employees*, members and nonmembers alike. *See* § 9(a) of the Act, 29 U.S.C. § 159(a); *Abood v. Detroit Board of Education*, 431 U.S. 209, 221 (1977) (duty of fair representation extends to nonunion employees). When a union is designated to serve in this capacity, "the individual employee's power to order his own relations with his employer" is extinguished; the

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[9] This failure also led to a revealing logical error. The court below conceded that the Board must ascertain whether the petitioning union can demonstrate "the absence of a 'question concerning representation'" raised by its proposed certification amendment. App. 8a; *see* 29 C.F.R. § 102.60(b). In resolving this question, the court reasoned, the Board should inquire into whether "the [affiliation] decision reflected the wishes of the union's members." App. 8a; *see also* App. 22a (due process inquiry must "protect union members' rights . . . to be represented by the organization of their choice"). But the sentiment of union members is utterly irrelevant to questions concerning representation. The Act protects *employee* freedom of choice; it does not mention free choice of *union members*. Employees retain their Section 7 right to choose their bargaining representative notwithstanding their nonunion status. *See Brown v. Hotel Employees Local 54*, 104 S.Ct. at 3192-93 n.3 (White, J., dissenting).

chosen union under federal law may bind even a nonmember to waivers of statutory rights, terms and conditions of employment, and provisions for processing his grievances. *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. at 180. Consequently, the designation of an exclusive bargaining representative, whether through an amendment of certification or some other procedure, "affects the interests of all employees in the bargaining unit directly and equally, whether they choose to be union members or not." Williams, *supra* at 25. In concluding that an amendment of certification is an internal union affair, then, the court below rested on an erroneous perception of the issues before the Board.

Even if an amendment of certification implicated internal union interests, however, the court below should not have independently balanced those interests against the national labor policy in favor of employees' "full freedom" of choice. As Judge Wright observed in his dissent, "balancing of interests . . . is the province of the Board, not the courts." [10] App. 25a. The court below thus did not give due deference to the Board's conclusion that the paramount concern was the integrity of its procedure for the "free" selection of bargaining representatives.

Prior decisions of this Court leave no doubt that an exceptional degree of deference was appropriate here. When internal union interests clash with the Section 7

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[10] The Board, not the courts, has the "primary responsibility" for accommodating conflicts between Section 7 rights and private property interests. *Hudgens v. NLRB*, 424 U.S. 507, 522-23 (1976). The Board, not the courts, must balance legitimate employer interests against employee rights under Section 7. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). And the Board, not the courts, has the duty of weighing the Section 7 right of employees to make a "fair and free choice of bargaining representatives" against "the asserted interest of employees in avoiding the problems that union solicitation may present." *NLRB v. Wyman Gordon Co.*, 394 U.S. 759, 767 (1969).

right to designate bargaining representatives, this Court has found the balance to tip in favor of protecting employee free choice. In *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973), for example, the union waived initiation fees for employees signing recognition slips during an organizational campaign. Involving the financial relationship between the union and its members, the union policy implicated a "legitimate" internal union interest in removing an "artificial obstacle" to union membership. *Id.* at 273-74, n.4 (citation omitted). Because this interest could be met without serving "the additional purpose of affecting . . . the election," *id.*, this Court held that the policy impermissibly conflicted with "[t]he right of a free choice . . . inherent in the principles reflected in § 9(c)(1)(A)." *Id.* at 279.[11]

Similarly, a union's internal interest in affiliation need not impair employees' statutory right to participate in selection of their bargaining representatives. The Board's ruling here preserves a union's right to affiliate or not to affiliate. App. 26a (Wright, J., dissenting). Unlike the rule adopted by the court below, however, it also preserves employees' rights to consent to or refuse to support a change in the statutory certification of their exclu-

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[11] The Court also observed that the initiation waiver policy might conflict with Section 7's guarantee of the right to *refrain* from concerted activity. 414 U.S. at 278-79. The same is true of a policy limiting affiliation votes to members, for it compels nonunion employees wishing to air their views to join the union. *See* App. 14a, n.10. To endorse this procedure "is to shut one's eyes to Section 7 [of the Act] . . . [which] clearly gives employees the choice . . . to refrain from engaging in [union] activities." *Amoco IV*, 262 N.L.R.B. at 1241. Indeed, the Board, with judicial approval, has held that an improper exclusion of nonmembers from a vote violates Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A), by coercing them to join a union. *Branch 6000, National Association of Letter Carriers*, 232 N.L.R.B. 263 (1977), *enf'd*, 595 F.2d 808 (D.C. Cir. 1979). Local 1182 engaged in this coercive practice by simultaneously limiting the franchise and urging nonunion employees to join the union in time to vote.

sive collective bargaining representative. The Board's accommodation of these two rights was within its discretion—indeed, it was compelled by the Act. It was not properly subject to the *de novo* review conducted by the court below.

C. The Decision Below Incorrectly Concludes That the Board's Rule Will Interfere With the National Policy in Favor of Stable Bargaining Relationships.

The decision below also relied upon a perceived conflict between the Board's desire to protect Section 7 rights and "the strong national policy of maintaining stability in the bargaining representative . . . ." App. 17a. This concern is illusory, however, for the Board's rule need not ever cause disruption in bargaining relationships. The Board will allow amended certifications if represented employees consent. In the absence of consent, the already certified entity will continue in its representational capacity. If these procedures are followed, all parties rest assured that the true employee representative is acting on employees' behalf. In this sense, the Board's "rule will promote stability more effectively than did its former position." App. 26a (Wright, J., dissenting). Disruption would occur only if the affiliate attempted to proceed as bargaining representative notwithstanding an unwillingness to adhere to the Board's procedures or an inability to garner majority support in the bargaining unit.

In this case, the Independent was aware that *Jasper Seating*, 231 N.L.R.B. 1025, required it to permit all unit employees to vote if it intended the affiliation election to serve as the basis for an amended certification. Nevertheless, the union *chose* to ignore governing law and to exclude nonmembers from all proceedings leading up to the request for an amended certification. The rule did not disrupt the bargaining relationship. The rule allowed no instability so long as it was followed. Only the

Independent's calculated disregard of known prerequisites to an amendment of certification caused this case to exist. The court below thus erred when, by expressing concern over stability, it gave more deference to the Independent's violation of the existing Board rule than it did to the rule itself.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

DATED this 25th day of March, 1985.

Respectfully submitted,

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March 25, 1985